MALAYAN BANKING BERHAD v. ZAHARI BIN AHMAD

[O.C.J. (Mohamed Dzaiddin J.) 23 February, 23 March, 22 June & 24 August 1987]

[Penang – Originating Summons No. 31-820-86]

Land Law – Writ of possession – Application for – Whether equitable charge created – R.H.C. 1980, O. 83.

The defendant owed the plaintiff a certain amount of money. Pursuant to the loan, a loan agreement and a deed of assignment were executed on 16 March 1974. The defendant defaulted on the repayment of the loan. The plaintiff applied to the court for an order, *inter alia,* that they be at liberty to issue a writ of possession in respect of the charged property and for an order that they be at liberty to sell. In addition, they wanted the proceeds of sale to be paid to them in satisfaction of the principal sum and interest due and owing to them. The plaintiff's application was made under Order 83 of the Rules of the High Court.

Held: (1) the National Land Code does not prohibit the creation of equitable charges and based on a body of authorities, our land laws recognize equitable charges;

(2) the loan agreement and the deed of assignment created an equitable charge both in form and substance;

(3) an application such as the present one for an order of possession and for sale of property should be made under Order 83 and not under Order 31 because by its nature and substance Order 83 provides for an application for sale by an equitable chargee. In the present case, the bank was an equitable chargee, as there is no issue document of title having issued in respect of the said property;

(4) an order should be made on the terms of the plaintiff's application.

Cases referred to:

(1) *Mahadevan s/o Mahalingam* v. *Manilal & Sons (M) Sdn. Bhd.* [1984] 1 M.L.J. 266 (cited).

(2) *Oldham* v. *Stringer* 51 L.T.N.S. 895; 33 W.R. 251 (consd).

ORIGINATING SUMMONS.

Teoh Soo Bee for the plaintiff/applicant.

Defendant in person.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: In this application the plaintiff has applied to this court for an order that they be at liberty to issue a writ of possession in respect of one unit of flat at Bandar Bayan Baru, Pulau Pinang and be at liberty to sell the said flat by public auction or by private treaty. In addition, they wanted the proceeds of sale to be paid to them in satisfaction of the principal sum and interest due and owing to them by the defendant under the loan agreement dated 16 March 1984. Further, they have also asked for an order that they be given liberty to sign and execute all necessary documents pertaining to the deed of assignment of even date.

The plaintiff based their application under Order 83 of the Rules of the High Court which reads as follows:

"1. (1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs, namely

(a) payment of moneys secured by the charge;
(b) sale of the charged property;
(c) foreclosure;
(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;
(e) redemption;
(f) reconveyance of the property or its release from the security;
(g) delivery of possession by the chargee.

(2) In this Order "charge" includes a legal and an equitable charge.

(3) ...

(4) ..."

From the affidavit of Mr. Lau Weng Yoong, the area manager of the plaintiff bank, affirmed on 30 August 1986, it is deposed that the defendant owed the plaintiff a sum of $21,733.04 with further interest as at 9 August 1986, being the loan granted by the plaintiff to the defendant to complete the purchase of the said flat. Pursuant to the said loan, the defendant executed a loan agreement and a deed of assignment on 16 March 1984, of which the terms and conditions were made known to the defendant. The defendant was in breach of the provisions of the said loan agreement by failing to pay at least five monthly instalments amounting to $1,155.00. It is provided in the said loan agreement that in default of the repayment of the instalments, the plaintiff is entitled to enter upon the said flat and deal with the rights, title and interest in relation thereto. Consequently, the plaintiff gave due notice through their solicitors demanding for the arrears of instalments and upon failure by the defendant to pay the same, the plaintiff exercised their rights under the said loan agreement by requesting the defendant to forthwith deliver up vacant possession of the said flat.

Mr. Chooi See Mun, counsel for the plaintiff, submitted that the present application is properly

brought up under Order 83 of the Rules of the High Court because this Order applies to a charge action, and the property being a flat, there is at that point of time no issue of strata title; the loan agreement and the deed of assignment take the form of documents giving rise to the creation of an equitable charge.

Clearly, the National Land Code does not prohibit the creation of equitable charges and based on a body of authorities, our land laws recognize equitable charges. In *Mahadevan s/o Mahalingam* v. *Manilal & Sons (M) Sdn. Bhd.*,[1] in interpreting the words "other charge on land", Salleh Abas C.J. (as he then was) stated at p. 270:

"Our land law does not recognize a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, *i.e.* ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognizes a mortgage in the sense of Torrens system, referred to by text written as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires statutory rights to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when section 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code [see *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan* [1917] A.C. 209]. That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable, which arise as a result of depositing a title with the lender.

The decision of the Privy Council in *Hj. Abdul Rahman* v. *Mahomed Hassan (supra)* certainly does not prevent the creation of an equitable charge."

Looking at the loan agreement and the deed of assignment in the present application, in my opinion these documents create an equitable charge both in form and substance. As Order 83 applies to a charge action, I make an order in terms of the plaintiff's application.

Incidentally, it was brought to my attention that similar applications had been made and orders for sale given under Order 31 rule 1. This order applies to any action or proceeding which relates to land and in which it is necessary or expedient to have such land or any part thereof sold. It will be observed that the power to order such sale is conferred by item 3 of the Schedule of the Courts of Judicature Act 1964. (See commentary in *Mallal's Supreme Court Practice* (2nd Ed.) under 31/1/2 at p. 385.) In *Mallal's* at p. 386, it is noted that a sale at the instance of an equitable mortgagee can be ordered under this rule and the learned author cited the case of *Oldham* v. *Stringer*.[2] This was an action by an equitable mortgagee by deposit of deed to enforce his security against the mortgaged estate by foreclosure or sale. The defendant had borrowed from the plaintiff a sum of money and as a security for the repayment of that sum had given him a promissory note, and deposited with him a title deed. However, as there was no memorandum of deposit, and no written agreement by the defendant to execute a legal charge, the plaintiff proceeded under section 25(2) of the Conveyancing Act 1881 for an order for sale which was granted. It was held that the words of the sub-section were wide enough to authorize a sale, although there was no such agreement. From the short report of the case, it does not appear that the application was made under the English rule similar to our Order 31. The present Order 31 was taken from Order 51 of the English Rules of the Supreme Court 1965 which dealt with the power of the court to order sale of real estate and which made mention of the mode of carrying out the sale, mortgage, partition when ordered by the court and power to make order for sale in debenture holders' action. It will be noted that these powers given under Order 51 have now come under "Special Provisions as to Particular Proceedings" in the 1985 Rules of the Supreme Court, *e.g.* Order 87 for debenture holders' action and Order 88 for charge action.

In my opinion, an application such as the present one for an order of possession and for sale of property should be made under Order 83 and not under Order 31 because by its nature and substance Order 83 provides for an application for sale by an equitable chargee. In the present case, the bank is an equitable chargee, as there is no issue document of title having been issued in respect of the said property.

Order accordingly.

Solicitors: *Wong-Chooi & Mohd. Nor.*